Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding	)	MB Docket No. 12-83

To: Chief, Media Bureau

REPLY COMMENTS OF THE CITY OF BOSTON, MASSACHUSETTS AND MONTGOMERY COUNTY, MARYLAND

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The initial comments filed in this matter illustrate the difficulty and importance of the issues raised by this proceeding. Almost all commenters agree on two points: first, that if Sky Angel may take advantage of the *benefits* extended to multichannel video programming distributors ("MVPDs"), it must also satisfy *obligations* imposed upon MVPDs. Second, that a decision that goes further than is required to resolve this case could have serious ramifications, so any decision should be carefully tailored in light of the facts before the Commission and reflect careful application of a few basic principles.[1]

Montgomery County and Boston agree with these points. Both have an interest in seeing more competition develop. Both are local franchising authorities whose communities have been the beneficiaries of franchises that require set aside of channel capacity on subscriber networks for public, educational and government ("PEG") access video programming channels, and provision of channel capacity on institutional networks ("I-Nets"). Both create local video

[1] Public Knowledge, for example, suggests that any beneficiary of the MVPD rules must also be willing to satisfy public obligations, although it also suggests that the duties would be triggered by the decision of an entity to take advantage of MVPD benefits. Comments of Public Knowledge, MB Docket No.12-83 at 22 (May, 2012).

programming. And both, as providers of emergency services, have an interest in ensuring MVPDs provide information that is accessible to all, including citizens with disabilities. Thus, Boston and Montgomery County have an interest in ensuring that the FCC not adopt a definition of "channel" in the MVPD context that harms local governments' ability to establish reasonable PEG and I-Net requirements, or that makes the applicability of important regulatory requirements depend upon the transmission technologies (IP, analog, digital, wired, wireless) used to deliver video programming to subscribers.

Boston and Montgomery County therefore believe it is important for the Commission to recognize the following four points in resolving this dispute:

1. It is important to recognize that the Communications Act ties benefits to assumption of obligations. The Commission cannot extend benefits to Sky Angel without requiring Sky Angel to accept the obligations that fall on MVPDs. Likewise, any lines the FCC draws must be clear enough so that those lines do not allow cable operators to retain benefits while escaping their own regulatory obligations.[2] Obligations and benefits go hand in hand: they are balanced to ensure that investment and fair competition is encouraged, and that other goals of the Communications Act, including accessibility of information to persons with disabilities and the widespread availability of information from a variety of sources, are advanced. As the Commission is aware, at roughly the same time as it issued the notice in this matter, Comcast announced that it would be entering into an arrangement with XBox that would allow for delivery of video programming to the XBox via a "private" Internet – and that the video

[2] It is fair to assess whether Sky Angel fits within the definition of MVPD by asking whether it or comparable providers could be expected to actually satisfy the obligations imposed on MVPDs in most situations (as opposed to seeking exemptions from them). Otherwise, the Commission would be encouraging all providers to adopt transmission technologies that avoid important public obligations.

programming delivered would not be subject to the data limits that apply to other information delivered via the Internet.[3] Enormous injury can follow if cable operators can avoid obligations under the Cable Act by using a slightly different technology to deliver the *same* type of programming via the *same* cable system, while maintaining the same control over subscribers. In deciding this case, the FCC needs to avoid creation of regulatory loopholes that do little to enhance competition, but much to harm the public interest.[4]

2. The term "channel" is used differently in different contexts within the Cable Communications Policy Act of 1984,[5] as amended, and the Commission may interpret terms in context. Public Knowledge is correct to conclude that the Commission is not bound to apply the definition of "cable channel" or "channel" at 47 U.S.C. § 522(4) to the phrase "channels of video programming" in the MVPD definition at 47 U.S.C. § 522(13) if that leads to a result plainly at odds with Congressional intent and the language of the MVPD provisions.[6]

The FCC faced a similar issue in interpreting the rate regulation provisions added to the Cable Act by the Cable Television Consumer Protection and Competition Act of 1992.[7] As initially adopted in 1984, the Cable Act defined "basic cable service" as "any service tier" that

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[3] Werner, Tony, Xfinity On Demand – Coming Soon to an Xbox 360 Near You, Comcast Voices (October 5, 2011) (last accessed June 12, 2012 at 10:05 a.m.) http://blog.comcast.com/2011/10/xfinity-on-demand-coming-soon-to-an-xbox-360-near-you.html; Comcast Customers Skip Data Caps as Xbox Service Becomes Complaint Target in Net Neutrality Debate, MSP News (March 27, 2012) (last accessed June 12, 2012; 10:05 a.m.) http://www.mspnews.com/news/2012/03/27/6216269.htm.

[4] Classification of a Sky Angel as an MVPD, for example, could affect the determination of whether communities are subject to "effective competition" under 47 U.S.C. § 543(l)(1); it would be harmful to consumers to treat Sky Angel or others as MVPDs if their offerings are less accessible or other consumer protections are lacking.

[5] PL No. 98-549, 98 Stat. 2729 (1984).

[6] Comments of Public Knowledge at 2-3.

[7] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

included broadcast channels, and plainly contemplated that there could be more than one basic service tier.[8] The 1992 rate regulation provisions appeared to contemplate a single basic service tier. Even though Congress did not create a separate definition of "basic service" for the rate regulation provision, the Commission ruled that in the rate regulation context, the 1992 amendments "effectively amend" the general 'basic tier' definition, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*: *Rate Regulation,* Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, 5759-60, 5881-82 (1993); *aff'd, Time Warner v. FCC*, 56 F.3d 15, 312 U.S. App. D.C. 187 (1995). While the statutory definition of "cable channel" can surely not be ignored, neither is it determinative,[9] and the Commission can properly decide this matter based on the phrase "channels of video programming" in the MVPD section.[10]

3. The Cable Act is technologically neutral: obligations generally do not depend on whether an entity uses an IP platform, some other digital platform, or an analog platform to deliver services; nor do they depend on whether the video is switched or not switched. The

[8] Pub. L. No. 98-549, § 602(3), 47 U.S.C. § 522(3).

[9] AT&T suggests that the 1984 definition of channel is not determinative because cable systems were the only MVPDs at the time of the Cable Act's initial adoption. Comments of AT&T, MB Docket No. 12-83, at p. 5 (May, 2012). In fact, the 1984 legislative history recognizes a national policy of promoting alternative "delivery systems … such as DBS, SMATV and subscription television." H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. 4655, 4660.

[10] We refer to the phrase in its entirety because the obligations and rights of an MVPD do depend on use of the term "channel" in context. The contextual nature of the use of the terms is illustrated in Section 611, 47 U.S.C. § 531, where the Cable Act refers to "channel capacity" for public, educational and government use in the context of the cable system in general, and in the context of institutional networks. With respect to the latter, Congress understood that the "capacity" being provided on "institutional networks" would "furnish communications links for business, government offices and schools" that would include "data transmission" and enable users to "bypass telephone companies." *Id.*, 1984 U.S.C.C.A.N. 4655, 4664-4665 while the "channel capacity" on the portion of the network used to serve residential subscriber would include "channels…for programming" equivalent to broadcast channels.

technology-neutral nature of the Cable Act is reflected in 47 U.S.C. § 544(e), providing that no franchising authority may "restrict a cable system's use of any type of subscriber equipment or any transmission technology." As a system is not a cable system unless it is designed to provide services which include "video programming,"[11] this provision necessarily implies that video programming can be delivered via a variety of platforms – IP, analog, or otherwise.

Moreover, the Commission generally has not distinguished between cable systems and non-cable systems based on delivery technology alone. The Commission found that an entity with, *inter alia,* no facilities in the rights of way, and providing video services to customers using facilities open to others and available pursuant to tariff under a carrier-user relationship, was not subject to cable franchising obligations, because the entity was not the cable operator of a cable system. *In the Matter of Entertainment Connections, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 14277 (1998), *aff'd, City of Chicago v. FC*C, 199 F.3d 424 (7th Cir. 1999), *cert. denied* (2000); *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules,* Memorandum Opinion and Order on Reconstruction, 7 FCC Rcd. 5069 (1993); *aff'd, National Cable Television Assoc., Inc. v. FCC,* 33 F.3d 66 (D.C. Cir. 1994) (*"VDT Proceedings"*). Technology was not determinative.

Similarly, the Commission has recognized a difference between an "on-demand" system and "linear programming channels."[12] The latter—which involve delivery of pre-scheduled programs that function, and can be accessed like traditional television channels without the use of the sort of multi-menu applications that characterize on-demand programming—can be

[11] 47 U.S.C. § 522(7).

[12] The term "linear programming" is generally understood to refer to video programming that is prescheduled by the programming provider, i.e., channels other than on-demand programming. *FCC Enforcement Advisory/Cablecards,* Enforcement Advisory No. 2011-09 26 FCC Rcd 11223 (2011).

categorized as "video programming channels." It is not the technology used (IP, analog, or other digital) that distinguishes the two. It is the fundamental operational differences from the viewer's perspective.

The Commission should continue a technology-neutral approach here. Any other approach would create enormous instability in the marketplace, by making regulatory obligations and benefits depend not on the sort of significant operational differences identified in *ECI*, but instead on technological tests whose application to any provider could change day to day or month to month, as new technologies are integrated into systems.[13]

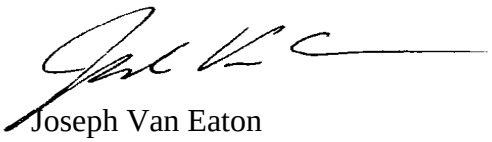
4. A "channel" of "video programming" is not simply defined by the control of a transmission path. In the VDT Proceedings, the Commission rejected arguments that a VDT system owner was a cable operator of a cable system, even though the system owner controlled and created the transmission pathway from the point it picked up a signal to the point it was delivered to subscribers, and used those pathways to deliver video programming. While it is true (as Cablevision suggests)[14] that the term "channel" in some cases can be treated as merely a

[13] Likewise, for reasons suggested in the initial comments, the Commission should exercise caution before reiterating that "video programming" in the Cable Act must mean programming akin to that provided by broadcast stations in 1984. The basis for that conclusion – or its meaning—is not entirely clear from the decisions cited by the Commission, but it does not appear critical to the decision in this matter.

[14] Comments of Cablevision System Corporation, MB Docket No. 12-83, at pp. 4-5 (May, 2012).

transmission pathway, in this context a reference to a "channel of video programming"—that is, a television channel—cannot.

Respectfully submitted,



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